



# M&A and Transaction Solutions: Claims Advocacy

Maximizing value throughout the deal lifecycle

Buyers, sellers and others active in mergers & acquisitions transactions have embraced the use of representations & warranties, tax, litigation and contingent insurances as a risk mitigation and deal facilitation tool to help improve outcomes, both within and outside of a transaction. Use of these policies has grown dramatically over the last five years. In 2018, Aon bound 688 deals across North America representing \$26 billion in policy limits, and those numbers have continued to increase in 2019. Not surprisingly, this growth has led to a corresponding rise in the frequency and severity of claims, leading many to ask how these policies perform when there is a claim.

As claims have been made over the past several years, Aon has generally seen that policies typically perform as anticipated, with valid claims being paid. In fact,

**Aon has helped negotiate payment** in excess of the retention on many representations and warranties claims, resulting in recognition of over **\$460 M** of loss and payments of over **\$315 M** from multiple insurers in amounts ranging from **\$400,000 to \$65 M**.

The representations & warranties claims made to date have comprised of both first- and third-party claims and have arisen from a variety of breach types, including financial statement and tax breaches in the United States and internationally, material contract issues, wage and hour complaints, and issues related to the condition of equipment. Aon has helped resolve numerous other claims that resulted in an erosion of the applicable retention, where loss did not exceed the retention. Of the more than currently 300 open claims, less than 1% have gone to arbitration at the time of this issuance.



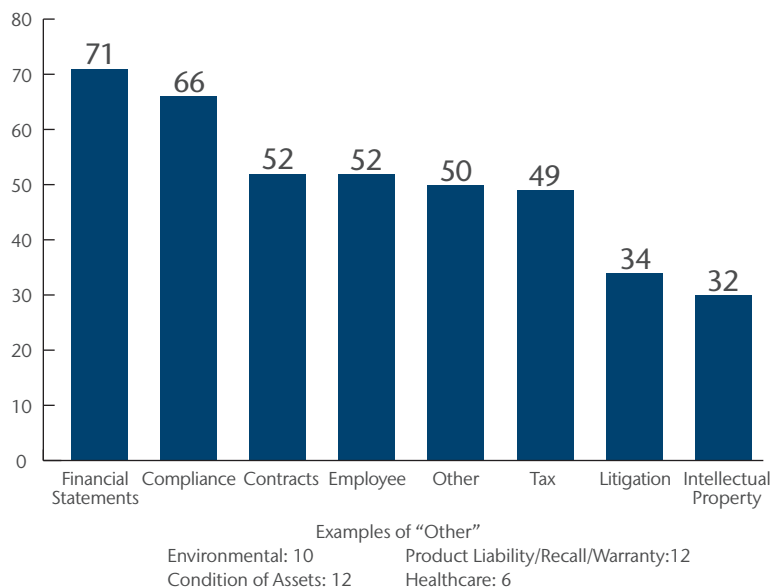
Aon's dedicated claims team is strongly positioned to work closely with our clients throughout the claims process. Led by a former law firm litigation partner, our experienced claims advocates and M&A insurance professionals are available to work

Aon's claims specialists and other insurance professionals have direct contact and regular discussions with the claims decision-makers across insurers. These relationships are supported by formal Claims Governance & Escalation Agreements, providing Aon with the opportunity to coordinate with the parties and work through complex issues. We use our experience to create a collaborative, rather than adversarial, dynamic in the claims process. Our goal is to help our client help the insurer understand the claim and the loss flowing from that claim so that the insurer is armed with the information needed to pay the claim as quickly and efficiently as possible. After a claim has been resolved, our clients and their legal advisors often report that the claims process was more straightforward and efficient than trying to recover against a seller.

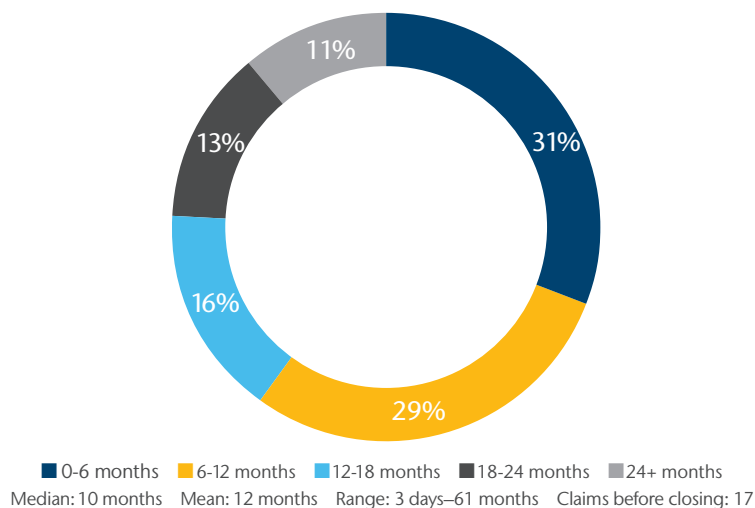


# Claim Trends\*

Types of Breaches

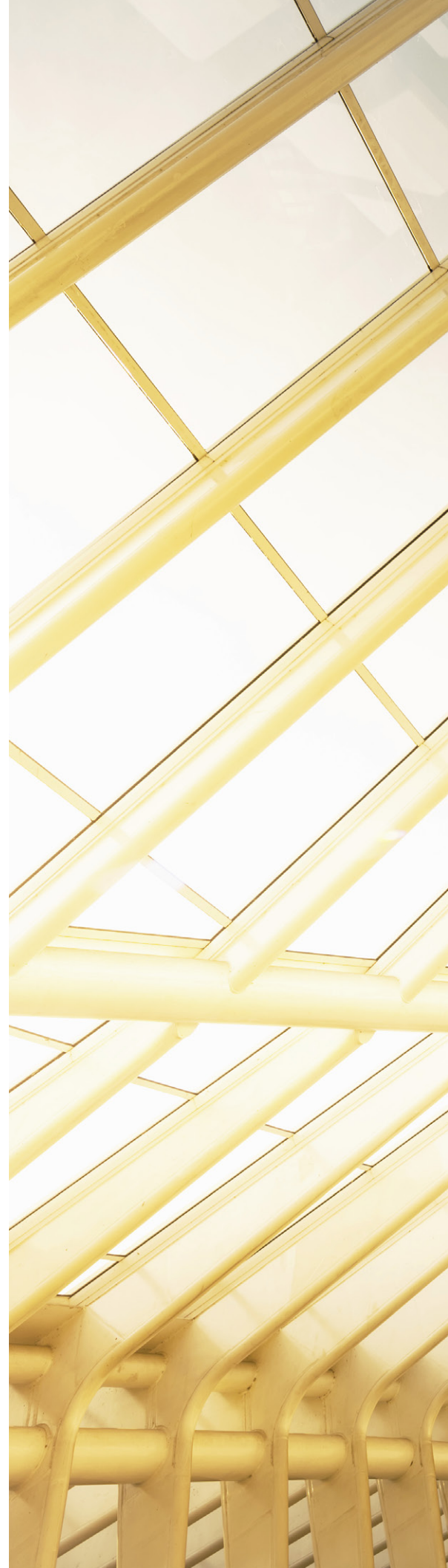


Time Between Closing and Claim Notice



Aon's data indicates the median time period between the close of a deal and the time a claim is noticed to the insurer is 10 months. The mean time period is 11 months. We have seen a claim noticed to the insurer as soon as three days following the close of a deal and as late as 53 months after close. A number of claims have been reported between signing of the agreement but prior to closing, relating to breaches that had occurred prior to signing.

\*As of October 30, 2019









# The Aon Advantage in Action

## **Financial Statements Misrepresentation**

A private equity firm secured a \$15 million representations and warranties policy, in excess of a \$3.2 million retention, for a company it had purchased on the basis of a 9x EBITDA multiple. When the private equity buyer discovered a \$2.3 million double counting issue, the company restated its financials as a result of the error and submitted a claim under the policy to its insurer, alleging that the seller had breached a representation regarding compliance with GAAP.

The insurer first tested the insured's calculations and whether it agreed that: (1) the financials were not in compliance with GAAP; and (2) the dollar for dollar loss was valued at \$2.3 million. The insurer requested the documents that had been used in connection with the insured's audit of the issue, not merely relying on the outcome of the audit itself or the spreadsheet summarizing the findings. Within a month of receiving documents from the private equity firm, the parties worked to validate the multiple used in the acquisition and validate the loss calculation. As a result of the analysis, the insurer paid the entire \$15 million policy limit to cover the loss suffered by the insured.










#### Failure to Disclose Termination of a Material Contract

Our client, a private equity firm, learned that prior to the sale an acquired company's largest customer, which accounted for a material percentage of recurring revenue, informed the former CEO of the acquired company that their contract would be terminated early. As this information was not disclosed in the due diligence process, our client submitted a claim under its representations and warranties policy alleging a breach of the material contracts representation. At the same time, they also notified the seller of the alleged breach and its potential liability for fraudulent conduct.

After conducting diligence on the contractual relationship and the nature of the disclosures made by the seller, including a review of emails from the customer advising the seller of the termination prior to the close of the transaction, the insurer concluded that the failure to disclose the termination was a breach. The insurer then turned its attention to whether a multiple of damages was warranted. Upon review, the insurer agreed that a multiple of the dollar for dollar loss was warranted and resolved the claim for nearly 90% of the policy limit. Aon's client and the insurer then turned their attention to the seller, and after presenting the evidence to the seller, the insured was able to recover additional funds, which were shared by the insured and insurer.



Aon is committed to providing clients with not only the industry's deepest brokerage team with M&A experience, but also a highly **experienced team of claims advocates** whose primary role is to **support clients throughout the claims process**, from filing an initial notice to ultimate resolution with the insurer.





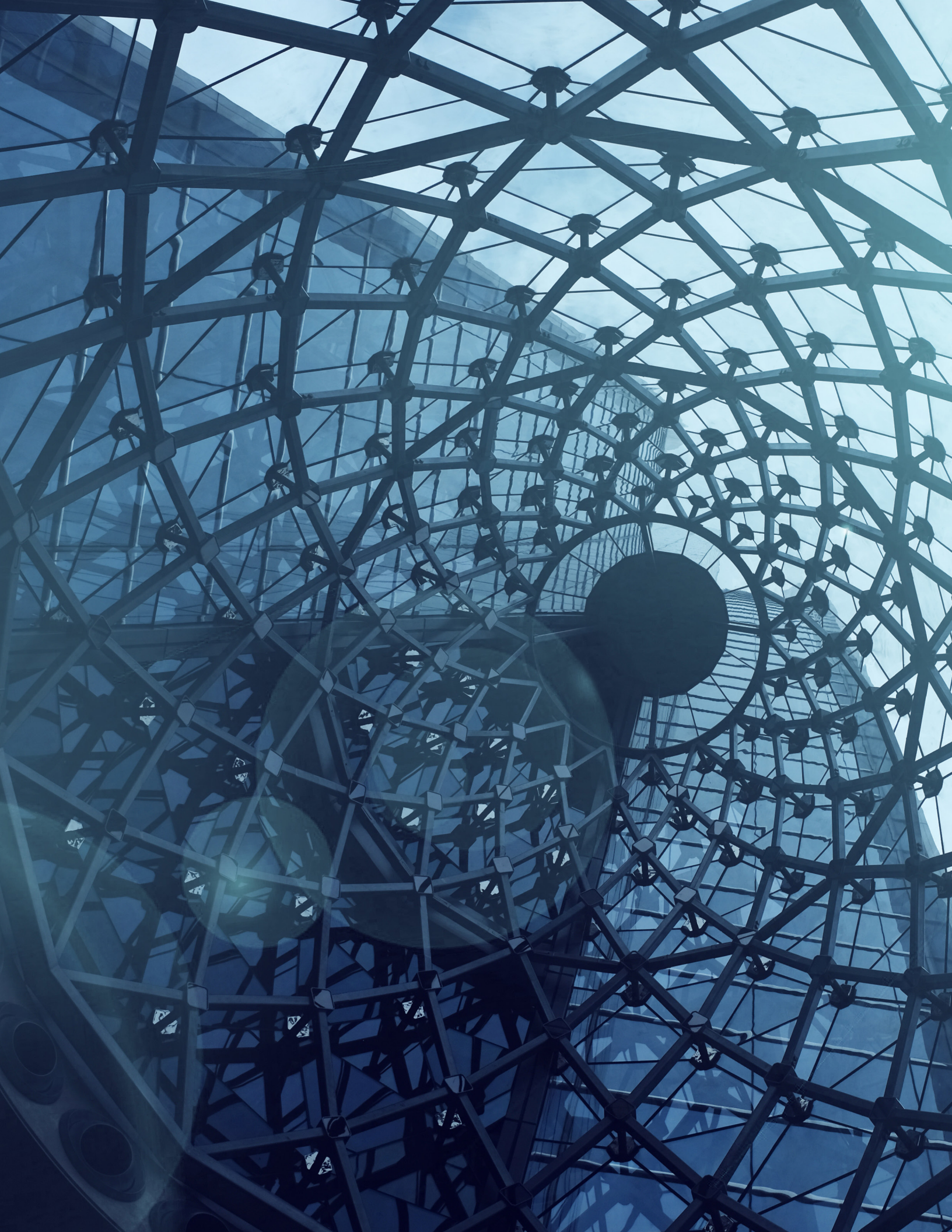
### **Corporate Buyer Discovered Overbilling of Largest Customer**

After the completion of a transaction, Aon's client was advised by the acquired company's largest customer that it had been overbilled by more than \$7 million beginning prior to the acquisition. Upon review, Aon's client determined that the customer had in fact been overbilled and commenced negotiations with the customer.

At the same time, our client submitted a claim under its representations and warranties insurance policy alleging that the seller had breached the financial statements representations.

Aon's client was anxious to resolve the overbilling issue to preserve the customer relationship and sought to enter into a settlement with the customer before the insurer had completed its review. The insurer, understanding the urgency, agreed not to raise lack of consent to the settlement as a defense while it completed its analysis. The insurer reviewed the customer's audit along with the buyer's evaluation and concluded that the actual overbilling amount was closer to \$3 million. The insurer agreed that the overbilling constituted a breach of the financial statements representations and that the buyer's settlement with the customer was reasonable. As a result, the insurer paid approximately \$3 million to our client. The client was able to refund the customer for overpayment and maintain this important relationship.







## Aon's Transaction Solutions Team

Aon's Transaction Solutions team has been leading the creation and advancement of transaction liability insurance since the market's inception. Comprising former senior M&A and tax attorneys and other senior M&A leaders, we bring a depth of knowledge and passion for developing tailored solutions to your complex deal risks that are unparalleled in this industry. We know firsthand that the timing and sensitivity of a deal are paramount to its success and work closely with your deal teams and insurance providers to advise and execute solutions that improve your deal outcomes.

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*If you have any questions about your specific coverage, or are interested in obtaining coverage, please contact your Aon broker.*

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## About Aon

Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance.

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